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PP

v.

GOH KIM KEAT

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HIGH COURT MALAYA, TAIPING
HASSAN AB RAHMAN JC
[CRIMINAL APPEAL NO: 42-5-2008]
8 JULY 2009

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CRIMINAL PROCEDURE: *Sentence - Sentencing principles - Sexual intercourse against the order of nature - Section 377B Penal Code - Accused misusing religious institution and taking advantage of trust confided in him by victim's family - Imprisonment for a term of two years - Whether inadequate - Whether to be enhanced*

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This was an appeal by the Public Prosecutor against the decision of the Sessions Court judge imposing an imprisonment term of two years on the accused for an offence of having sexual intercourse against the order of nature under s. 377B of the Penal Code. The facts showed that the accused, a medium at a Chinese temple in Pokok Assam, Taiping, while conducting a prayer session for the victim and her family between 10pm and 11pm on 5 September 2001, had asked the victim to open up her mouth and, upon the victim obliging, introduced his penis into the said mouth of the victim. The learned Sessions Court judge, in passing sentence, had *inter alia* taken into consideration the fact that the accused was a first offender. It was not in dispute that the maximum imprisonment term prescribed by s. 377B is 20 years, and that being so, before the learned Judicial Commissioner, a question arose as to whether the sentence passed was inadequate and ought to be enhanced accordingly.

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Held (allowing the appeal and enhancing the sentence):

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(1) The court finds no reason to disagree with the considerations of the Sessions Court judge before passing sentence, either on his application of the sentencing principles or his consideration that the accused is a first offender. Nonetheless, the term of two years' imprisonment is certainly inadequate bearing in mind the facts of this case. Further, considering that the offence carries a maximum sentence of 20 years' imprisonment, the imposition of two years' imprisonment seemed to have disregarded public interest. (paras 7, 8 & 9)

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(2) The condemned act of the accused can never be accepted by any religion, custom or belief, more so when it was committed by a person entrusted with great faith and hope, and committed at a place considered as sacred. Such contemptible act has caused the victim to endure much shame and humiliation. (para 7)

(3) Taking public interest as the paramount consideration, and without setting aside the accused's interest, the court is of the view that six years' imprisonment is the appropriate sentence to be passed for the offence proved in this case. Be that as it may, a whipping sentence is inappropriate and ought not to be imposed on the accused. (para 10)

[Order accordingly]

Case(s) referred to:

Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC (*refd*)
Liow Chow & Another v. PP [1939] 1 LNS 52 HC (*refd*)
PP v. Fam Kim Hock [1956] 1 LNS 83 HC (*refd*)
PP v. Lim Guan Hock [1949] MLJ 231 (*refd*)

Legislation referred to:

Penal Code, s. 377B

For the prosecution - Gean Sharmila Jesudason DPP

For the accused - Naran Singh

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Hassan Ab Rahman JC:

[1] The respondent in this case (hereinafter referred to as the accused) was charged in the Sessions Court under s. 377B of the Penal Code for having sexual intercourse against the order of nature by introducing his penis into the mouth of one girl by the name of Leow Choy Khim.

[2] The charge reads as follows:

Bahawa kamu pada 5.9.2001 di antara jam lebih kurang 10.00 malam hingga 11.00 malam di sebuah Tokong-Zhi Ong Ya Sien Shu, No. 241, Lorong 8, Pokok Assam, Taiping, di dalam Daerah Larut Matang di dalam Negeri Perak, telah melakukan

- A persetubuhan di luar tabii terhadap seorang perempuan bernama Leow Chow Khim, KP: 851023-08-5760, iaitu dengan memasukkan kemaluan kamu ke dalam mulut penama. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 377B Kanun Keseksaan.
- B [3] The Sessions Court judge had found the accused guilty and convicted him on the charge after calling for his defence. The accused was sentenced to two years' imprisonment commencing from the date of conviction ie, 13 March 2008.
- C [4] The accused at the first instance had lodged an appeal against his conviction and sentence. The prosecution on the other hand, lodged a cross-appeal against the sentence.
- D [5] However, on the hearing date, the appellant's counsel withdrew the appeal but wished to proceed with his submission on the prosecution's cross-appeal who was dissatisfied with the sentence imposed by the learned Sessions Court judge on the following grounds:
- E a) had failed to give sufficient considerations that the accused had taken advantage of the trust confided in him by the victim's family;
- F b) had failed to give enough consideration to the fact that the accused had misappropriated a religious institution for his own use;
- G c) had failed to give adequate concern to the plan arranged by the accused to perpetrate this crime;
- d) the sentence imposed is not a deterrent signal to potential offenders;
- H e) had failed to give enough thought on the trauma experienced by the victim; and
- f) had failed to take into account that a whipping sentence can be imposed for this kind of cases.
- [6] The facts of this case are as follows:
- I Pada malam kejadian iaitu antara pukul 10.00 hingga 11.00 malam (5.9.01) mangsa (SP1) bersama ibunya (SP6), kakaknya (SP3), adik dan anak saudaranya pergi ke Tokong-Zhi Ong Ya Sien Shu, di Pokok Assam, Taiping, bertujuan untuk menunaikan sembahyang dan doa selamat.

Tertuduh yang mereka kenali sebagai Chee Wong Yeh ialah seorang perantara (medium) yang bertugas di tokong itu mengendalikan ibadat sembahyang dan doa selamat.

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Dalam kejadian itu, mangsa sekeluarga disuruh oleh Tertuduh bersembahyang dan berdoa dengan cara melutut. Kepala dan muka mereka ditutup dengan kertas yang besar sampai ke paras hidung. Mereka juga disuruh membakar 3 colok setiap orang. Mangsa sekeluarga diatur supaya melutut di tempat masing-masing sambil berdoa.

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Susunan tempat duduk ialah mangsa disuruh mengadap Tertuduh. Kakak, ibu dan adik mangsa disuruh mengadap pintu dan seorang lagi pembantu disuruh melutut menghala keluar. Semasa berdoa kepala mangsa ditutup dengan satu benda sampai ke paras mata. Mangsa dan semua orang disuruh memejam mata dalam keadaan lampu terpasang.

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Sedang masing-masing melakukan seperti yang diarahkan oleh Tertuduh, Tertuduh yang berada di depan mangsa telah menyentuh mata mangsa dengan jari sambil membaca doa. Mangsa terasa ada suatu benda yang menyentuh bibirnya semasa Tertuduh menyuruhnya membuka mulut. Mangsa menurut arahnya membuka mulut. Apabila mulut dibuka, mangsa terasa kemaluan tersentuh pada lidahnya.

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Apabila begitu, mangsa dengan serta merta membuka mata dan cuba mengelak. Tetapi Tertuduh mencuba sekali lagi memasukkan kemaluannya kali kedua dan berjaya dielak. Apabila Tertuduh mencuba sekali lagi, mangsa terus menjerit dan lari keluar. Apabila mendengar jeritan ini, kakak mangsa (SP3) berpusing ke arah adiknya itu dan nampak Tertuduh cepat-cepat memasukkan kemaluannya ke dalam seluar.

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Mangsa terus membuat laporan polis seperti dalam laporan Pokok Assam No. 812/2001 (P2). Tertuduh ditangkap pada malam yang sama lebih kurang pukul 11.55 malam oleh SP 2 Kpl. 98863 Vijay Kumar a/l Terlok Chand.

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[7] After reading the appeal record and finding that the above facts were proven, and after considering the submissions of both parties, this court decided to enhance the imprisonment term of the accused from two years to six years of imprisonment taking effect from the date on which it was passed on the following grounds:

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- (a) The imprisonment term of two years is inappropriate to the proven facts, the crime scene and the pre-planned manners in which the offence was committed by the accused.

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- A The condemned act of the accused can never be accepted by any religion, custom or belief. Furthermore, it was committed by a person entrusted with great faith and hope, as the accused was a 'medium between men and God' (according to the victim and her family's belief) and was in charge of the religious institution.
- B
- C The big hope and trust confided in the accused by the victim and her family to lead them in prayer had been abused by the accused in a place they considered sacred. This place should have been safe from such immoral conduct. What the accused did would definitely cause embarrassment and disgrace to the integrity of the victim's whole family. Such a contemptible act has caused the victim to endure much shame and humiliation.
- D (b) The sentence of two years' imprisonment is insufficient for a serious crime as this, as the legislature actually intends that offenders thereof be severely punished in order to protect the public interest.
- E (c) Public interest seems not to have been regarded as an important consideration when the accused is only punished with a two-year term of imprisonment for an offence with a prescribed maximum sentence of 20 years' imprisonment.
- F (d) The sentence of two years' imprisonment is not a clear signal to suggest that the offence committed by the accused is indeed a heinous crime. Hence, the short term of imprisonment is viewed as not illustrating the seriousness of the offence under s. 377B incorporated by the legislature in the Penal Code. This Court is fully aware of the well established sentencing principles in the cases of *PP v. Fam Kim Hock* [1956] 1 LNS 83, *Liow Chow & Another v. PP* [1939] 1 LNS 52 and *PP v. Lim Guan Hock* [1949] MLJ 231.
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- H (e) Though the offence committed by the accused is not as rampant as drug trafficking, rape, snatch-theft, armed robbery or illegal racing and is not causing the victim to suffer the traumatic effect like rape and incest victims, nonetheless, this court is of the opinion that the public at large who believe in good cause and hope for security, just like the victim's family, would demand that they be protected from criminals like the accused, a person upon whom they put their trust. The victim's fright and her spontaneous act of running out from the temple should suffice to manifest her disappointment and trauma. The
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victim's high hope and trust as illustrated in this case is similar to that of the hope and trust put upon parents and for that matter grandfathers by the children and grandchildren who anticipate their protection against the offence of incest, and also by the sick who expected to be healed by medical practitioners. This court should have considered a deterrent sentence to deter any potential offender emerging from this class of people who are highly entrusted in the society.

[8] In connection to this, the court should not be viewed as concluding that the Sessions Court judge had erred in his application of the sentencing principles when this court enhances the sentence he pronounced. In this context, this court is fully aware and had taken into account the principles spelt out by the Federal Court in the case of *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1982] MLJ 83.

[9] This court finds no reason but to agree with the considerations of the Sessions Court judge on the fact that this is the accused's first offence and on the marital status of the accused in imposing the sentence. Nonetheless, the term of two years' imprisonment is certainly inadequate bearing the facts of this case.

[10] In a nutshell, grounds (a) to (e) of the prosecution's appeal are substantiated. Therefore, taking public interest as the paramount consideration and without setting aside the accused's interest as elaborated in the grounds aforesaid, this court is of the view that the term six years' imprisonment is the most reasonable and appropriate sentence to be passed against the offence proved in this case. With that, the prosecution's appeal is hereby allowed. Be that as it may, whatever aspect of public interest that has been considered in this case, this court believes that a whipping sentence ought not to be imposed on the accused for the offence that he has committed.

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